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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARTIN TREVINO, et al., Defendants and Appellants.	B220567 (Los Angeles County Super. Ct. No. VA110898)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed as modified.

Victoria Stafford, under appointment by the Court of Appeal, for Defendant and Appellant Martin Trevino.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant Jose L. Cuevas.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Martin Trevino was convicted of one count of assault with a firearm and one count of possession of a firearm by a felon, along with gang enhancements for each count and an enhancement for "personal use" of a firearm during the commission of a crime pursuant to Penal Code, section 12022.5.[1] He now appeals the jury's true finding on the firearm enhancement arguing *inter alia*[2] that insufficient evidence existed to support such a finding. As we shall explain, the evidence presented at trial did not support a finding that appellant Trevino personally used a firearm under section 12022.5. Consequently, the judgment is modified to strike the section 12022.5 firearm enhancement and affirmed as modified.

Appellant Jose L. Cuevas was convicted of attempted murder and receipt of stolen property, along with gang enhancements as to both charges. It was also found that Cuevas personally and intentionally discharged a firearm during the commission of the crime, causing great bodily injury to another person, in violation of section 12022.53, subdivision (d). Appellant Cuevas filed a timely notice of appeal. However, his court appointed counsel notified this court pursuant to *People v. Wende* (1979) 25 Cal.3d 436, that counsel was unable to find any arguable issues to assert on appeal. As we shall explain, our review of the record convinces us that no arguable issues exist, and consequently we affirm.

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1 All further code references, unless indicated otherwise, are to the Penal Code.

2 Appellant Trevino also argues that the trial court misled the jury by giving them an instruction on personal use of a firearm by an accomplice. The effect of this instruction, he claims, was to allow the jury to find that appellant Trevino had personally used a firearm based solely on evidence that his accomplice had personally used a firearm. However, as we agree that there was insufficient evidence presented at trial for a jury to reasonably infer that appellant Trevino "personally used" a firearm during the commission of the crime, we do not reach his argument regarding the jury instruction.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Shooting

On September 1, 2008, at around 8:00 p.m., Felipe Garcia, Jose Luis Cuevas, and appellant Martin Trevino drove a stolen black two-door Honda to the area of 66th Street and Holmes Avenue in Los Angeles, California. The three were members of the Watts Vario Grape Street criminal street gang. The area of 66th and Holmes is within the territory of the Florencia 13 Gang, one of Watts Vario Grape Street's main rivals.

Garcia drove the Honda, Cuevas sat in the front passenger seat holding a .357 revolver, and appellant Trevino sat in the back seat holding a sawed-off shotgun. At the corner of 66th and Holmes, Garcia brought the car to a stop in front of a liquor store, where a group of people congregated. Cuevas stepped out, shouted "Where you from?" and fired five shots from his revolver, striking the victim Andres Albarran in the stomach and leg. Cuevas quickly got back in the car and Garcia sped away.

Soon after leaving the scene of the shooting, Garcia saw a police vehicle make a U-turn, as if to follow them. Garcia immediately jumped out of the car and fled on foot. Without a driver, the car continued down the road and eventually crashed into a parked car. When the vehicle had come to a stop, Cuevas jumped out of the car and ran, leaving the revolver and spent casings in the vehicle. Trevino climbed out of the car and likewise fled on foot taking his weapon with him. Trevino threw the shotgun into a trash can as he ran away. Both Cuevas and Trevino were apprehended by sheriff's deputies after a short chase and identified by a percipient witness as the two men who had escaped the car after the crash.[3] The witness saw that Trevino had "something" in his hand when escaping from the car, but could not identify the object at trial.

Cuevas' revolver, loaded with one live round and five expended shell casings, was recovered from inside the crashed Honda. Police found Trevino's loaded shotgun in the

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[3] Garcia was not apprehended on the night of the shooting; however, after further investigation confirmed his identity as the driver of the Honda, he was arrested at his home on September 30, 2008. Garcia was tried separately from Trevino and Cuevas.

trash can. However, no empty shotgun shells were found either in the Honda or near the crime scene. Fragments of shotgun "wadding" were found near the crime scene, but no evidence was offered to connect the wadding to the shotgun held by Trevino. The investigating officer, Detective Dean Camarillo of the Los Angeles County Sheriff's Department's gang unit, testified at trial that it "would not surprise" him to find shotgun wadding at that corner because of the violent nature of the neighborhood and the frequency of shooting incidents at the location.

B. Arrest and Charges

In a five-count information, appellant Trevino was charged in count one with attempted murder (§§ 664 & 187, subd. (a)); in count two, with possession of a firearm by a felon (§ 12021, subd. (a)(1)); in count three, with the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)); in count four, with receiving stolen property (§ 496d, subd. (a)); and in count five, with failing to stop at the scene of an accident (Veh. Code, §20002, subd. (a)). Additionally, firearm enhancements (§ 12022.53, subds. (b), (c), & (d)) and gang enhancements (§ 186.22, subd. (b)) were alleged as to all counts. Appellant Cuevas, was charged in identical fashion except that he was not charged with possession of a firearm by a felon.

C. Jailhouse Statements[4]

After Cuevas and Trevino were arrested and booked on September 1, Trevino made several telephone calls to his girlfriend, mother, sister, and aunt. Additionally, at some point on September 2, Cuevas and Trevino were placed in a holding cell together,

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4 During the course of these statements, frequent references were made to the gang members' individual monikers. Testimony elicited at trial, as well as contextual clues from the statements themselves, established that Garcia is known within the Watts Vario Grape Street gang as "Chivo," Cuevas as "Largo," and Trevino as "Husky," "Bear," or "Oso." For convenience, references to each gang member by moniker have been replaced herein with their real names.

where they spoke at length about the shooting. Each of these conversations was monitored and recorded by Detective Camarillo.

During the course of the telephone conversations, Trevino recounted his role in the shooting. He recalled initially refusing to go along on the mission because it was a "hot day," but eventually relenting after members of the gang forced him to go along because he had not "put in work for the hood." He also described in detail the events of the shooting, including how Cuevas had fired several shots and how Garcia had fled the car, leaving him and Cuevas to escape from the subsequent crash on their own. After running from the vehicle, he explained that he had tried to tuck the shotgun into his belt to hide it, but after realizing he could not, threw it into a trash can. Appellant Trevino claimed, though, that he had not fired the shotgun and that he believed the results of a gunshot residue test on his hands would come back negative.[5]

Cuevas and Trevino further incriminated themselves by discussing the shooting in the course of their conversation in the holding cell. As in his telephone conversations, Trevino reiterated that he had originally refused to "do the job." However, he and Cuevas agreed in the holding cell that after being encouraged by other gang members, they had gotten "pumped up" for the mission. With regard to the shooting itself, Trevino recalled that Cuevas had barely gotten out of the car, and in fact had only put one leg out of the open door before firing five shots. Cuevas defended himself by saying that he did not have time to exit fully because he saw the men on the corner looking at him and suspected that they were also armed. Trevino told Cuevas that if he had had a "couple more seconds" to get out of the car he would have fired his weapon along with Cuevas, but Garcia took off before he could do so.

While recounting the shooting, Trevino continually berated Cuevas for his actions during and after the incident, calling him a "fucking idiot" for leaving the revolver in the

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[5] Although the sheriff's department performed gunshot residue tests on both Cuevas and Trevino shortly after the shooting, they did not analyze either sample taken in this particular case.

car and for failing to get rid of his conspicuous striped shirt while attempting to escape. He also expressed anger that Garcia had jumped out of the car and abandoned them instead of continuing to drive. He was particularly upset that he was in the back seat and had to struggle to get out through the front seat once the car had crashed. However, although Cuevas expressed a fear that they had been caught on the liquor store's cameras, Trevino appeared confident that nobody could have seen him through the car's back windows because they were closed and tinted.

Joint trial for Cuevas and Trevino commenced October 2, 2009, with separate juries impaneled for each defendant. On October 7, 2009, the information for each defendant was amended by motion of the prosecutor to dismiss count five and to strike the firearm enhancements as to counts two, three, and four.

D. Expert Testimony

Two members of the Los Angeles County Sheriff's Department gang unit testified in Cuevas' and Trevino's joint trial. The first, Detective Camarillo, testified that the crime scene was within the territory of the Florencia 13 gang and that the victim, Andres Albarran, was a member of Florencia 13's Holmes Street clique. The Holmes Street clique frequently hung out in front of the liquor store on the corner of 66th and Holmes. He also described the relationship of both Florencia 13 and Watts Vario Grape to the Mexican Mafia prison gang. The Mexican Mafia, or "Eme," sometimes set forth "reglas" (rules) which set standards of conduct for all Southside Mexican gangs, including Florencia 13 and Watts Vario Grape Street. One such mandate, enacted several years ago, banned the use of drive-by shootings in gang warfare, requiring instead that a shooter exit his vehicle before firing in order to avoid hurting innocent bystanders.

The second, Officer Harlan Taylor, testified that his primary assignment in the gang unit for three years was the Watts Vario Grape Street gang. His testimony was used primarily by the prosecution to establish predicate gang-related crimes committed by two other Watts Vario Grape Street members, Herman Maravilla and Diego Avando. Officer Taylor also described the primary activities of the gang as shootings, murders, robberies,

burglaries, and narcotics sales, and was able to identify numerous gang members from their photos. When presented with a hypothetical with facts corresponding in every detail to the facts of this case, Officer Taylor opined that the shooting was carried out for the benefit or at the direction of the gang.

E. Verdict, Sentencing and Appeal

On October 9, 2009, Cuevas' jury returned a guilty verdict on the charges of attempted murder and receipt of stolen property, along with gang enhancements as to both charges. The jury also concluded that Cuevas had "personally and intentionally discharged a firearm during the commission of the crime, causing great bodily injury to another person, in violation of section 12022.53(d) of the Penal Code." Appellant Cuevas filed a timely notice of appeal on November 16, 2009.

Appellant Trevino's jury returned guilty verdicts on the lesser included charge of assault with a firearm (§ 245, subd. (a)(2)) and the charge of possession of a firearm by a felon, along with gang enhancements as to both charges. The jury also concluded that he had "personally used a firearm during the commission of the crime in violation of section 12022.5 of the Penal Code." Appellant Trevino was sentenced to the high term of four years for assault with a firearm, a mandatory additional term of five years for the gang enhancement, and an additional middle term of four years for the section 12022.5, subdivision (a) firearm enhancement for a total of thirteen years in state prison. However, the court stayed his sentence on the charge of possession of a firearm by a felon. Notice of appeal was timely filed on November 16, 2009.

DISCUSSION

I. Appellant Trevino's Appeal

Trevino appeals from that portion of his sentence attributable to the section 12022.5 firearm enhancement, for which he received an additional term of four years in the state prison. With respect to this enhancement, Trevino contends that there was insufficient evidence to support the jury's true finding that, during the events of

September 1, 2008, he "personally used" a firearm within the meaning of section 12022.5, subdivision (a).

In reviewing a judgment for the sufficiency of the evidence, we must review the evidence in the light most favorable to the judgment, to see if there is "substantial evidence" from which any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577 [applying an identical standard under the California Constitution].) This standard applies whether the challenged finding was a guilty verdict or a true finding on an enhancement. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382; *People v. Wilson* (2008) 44 Cal.4th 758, 806 [considering a sufficiency of the evidence challenge to a firearm enhancement under section 12022.5].) Thus, we "presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence." (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.)

The section 12022.5, subdivision (a) firearm enhancement imposes an additional and consecutive term of imprisonment for 3, 4, or 10 years upon "any person who personally uses a firearm in the commission of a felony or attempted felony." To define the phrase "personally uses," we look to section 1203.06, subdivision (b)(2), which states that an individual "uses" a firearm when he or she intentionally fires it, intentionally strikes or hits a person with it, or intentionally displays the firearm in a menacing manner. Personal use means exactly that—personal use; under section 12022.5, a defendant cannot be held vicariously liable for an accomplice's use of a firearm. (*People v. Gutierrez* (1996) 46 Cal.App.4th 804, 813-814). It is undisputed that appellant Trevino was in personal possession of a shotgun during and immediately after the shooting. Indeed, he admitted as much during the course of his conversation with Cuevas and his telephone conversations with his girlfriend and mother. However, it is difficult to see how appellant Trevino's jury could have reasonably deduced from the evidence presented at trial that Trevino personally used a weapon under section 12022.5, subdivision (a).

There was no evidence presented demonstrating that appellant intentionally fired the shotgun, intentionally struck someone with the gun, or even intentionally displayed it in a menacing manner.

Respondent appears to concede that there is no evidence to support an inference that appellant Trevino either fired the shotgun or struck someone with it. No witness testified as much, no victim of an injury was produced, and no spent shell casings were found in the Honda (as there were with Cuevas' revolver). Moreover, although fragments of shotgun "wadding" were found near the scene of the shooting, no evidence was presented to link the wadding to appellant Trevino's shotgun. Even Detective Camarillo testified that he would "not be surprised" to find similar fragments in that area, due to the violent nature of the neighborhood and the frequency of shooting incidents in the area.

As such, we concentrate our inquiry on whether sufficient evidence exists to find that appellant Trevino intentionally displayed the shotgun in a menacing manner. A firearm is displayed when, "by sensory perception, the victim is made aware of its presence." (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 421.) Additionally, the display of the firearm must be menacing – i.e., "coupled with a threat to use it which produces fear of harm in the victim." (*Ibid.*) There is no need for any victim to necessarily see the weapon, as long as he or she knows the assailant to possess a firearm and have threatened in some way to use it. (See, e.g., *People v. Chambers* (1972) 7 Cal.3d 666, 672 [defendant pointed a gun at victim and demanded money]; *People v. Jacobs* (1987) 193 Cal.App.3d 375, 382 [defendant told the victim that he had a gun, then reached into his pocket and cocked the hidden weapon such that victim could hear it]; *People v. Dominguez*, *supra*, 38 Cal.App.4th at p. 422 [defendant threatened to kill victim while holding a gun to the back of victim's neck such that victim could feel it against his skin].)

However, although appellant Trevino was undisputedly in possession of a shotgun during the incident in question, no evidence was presented at trial to show that any victim

or potential victim perceived any sort of threat from anything appellant Trevino did with the weapon. During the shooting itself, Trevino remained in the back seat of the Honda while Cuevas quickly stepped out of the car with one foot, fired five shots, and got back in the car. Both he and Cuevas acknowledged that everything happened so quickly that appellant Trevino did not even have an opportunity to get out of the car to fire his own weapon as he had intended. There is nothing to indicate that he was able to brandish his weapon from the back seat of the Honda during the few seconds the Honda was stopped at the corner. Further, no witness testimony was elicited to show that anyone on the corner could even see that appellant Trevino had a weapon through the closed, tinted rear windows of the two-door Honda.

The one time that appellant Trevino could have been seen with the shotgun occurred after the car had crashed and he had gotten out to flee. At that time, he was seen holding the shotgun by at least two witnesses: the witness who eventually identified him and who testified at trial, and the witness who "snitched" to the sheriff's deputies that appellant Trevino had thrown the shotgun in a trash can. There is no evidence, however, that he was displaying the shotgun to these witnesses in a "menacing" manner. On the contrary, Trevino tried to hide the shotgun to avoid being caught. The witness who identified appellant Trevino to the police was not even sure that the object held by Trevino was a weapon.

Respondent musters only a few points in support of its argument that there was substantial evidence that appellant Trevino displayed a shotgun in a menacing manner. First, respondent argues that Trevino "was no bystander" to the shooting, noting that he was "pumped up" to attack Florencia 13 gang members personally and "would have shot" if he had had a bit more time to get out of the car. Respondent also points out that Trevino was so focused on the shooting that he could later vividly recount the details of the crime. Although this evidence certainly reveals appellant Trevino's malicious intent, it does nothing to support an inference that any victim was aware of the presence of the shotgun or was afflicted by a fear of harm resulting from Trevino's possession of the

weapon. Further, respondent asserts that there is evidence that the victims were "close" to the Honda such that a jury could draw a reasonable inference that Trevino's shotgun "had been so deployed that it was visible to any victim looking his way." "A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002; citations omitted.) Because none of the witnesses at trial perceived the actual shooting, and neither Cuevas nor appellant Trevino ever gave any concrete estimate as to the distance between the car and victims during the shooting, we cannot find any reliable evidence to support the People's assertion that the victims were "close" enough to the car to assume that they could see appellant Trevino's shotgun.

As a result, we conclude that the jury's finding that appellant Trevino "personally used" a firearm in the commission of the crimes at hand was not supported by sufficient evidence.[6]

II. Appellant Cuevas' Appeal

Appellant Cuevas filed a timely notice of appeal on November 16, 2009. This court appointed counsel to represent Cuevas on appeal. After examining the record, Cuevas' appellate counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, indicating that he was unable to find any arguable issues to assert on appeal. On April 30, 2010, this court advised Cuevas that he had 30 days within which to personally submit any contentions or issues he wished us to consider. No response has been received to date.

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6 A lesser enhancement is set forth in section 12022 for offenders who are merely "armed" with a weapon during the commission of a felony. Although an appellate court may unilaterally reduce a section 12022.5 "personal use" enhancement to the lesser section 12022 "armed" enhancement when supported by the evidence, as is the case here, the section 12022 enhancement cannot attach when possession of a weapon is an element of the underlying offense. (*People v. Allen* (1985) 165 Cal. App. 3d 616, 627.)

We have examined the entire record and are satisfied appellant Cuevas' counsel has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende*, *supra*, 25 Cal.3d at p. 441.)

DISPOSITION

The judgment in the case of appellant Martin Trevino is modified by striking the jury's true finding on the section 12022.5 firearm enhancement, and appellant's sentence is thus reduced to nine years. In all other aspects the judgment as modified is affirmed. Upon issuance of remittitur, the trial court will cause its clerk to prepare an amended abstract of judgment that includes the modified sentence as provided here, and to forward a certified corrected copy of the amended abstract to the Department of Corrections and Rehabilitation.

The judgment in the case of appellant Jose L. Cuevas is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**